Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RDC GOLF OF FLORIDA I, INC., a Florida Corporation,
Petitioner,

v.

GEORGE P. APOSTOLICAS, individually and derivatively of HEATHROW GOLF COMPANY LIMITED PARTNERSHIP, a Florida Limited Partnership,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida for the Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a court is determining whether to vacate an arbitration award for "evident partiality" pursuant to 9 U.S.C. § 10, and state arbitration statutes containing identical language, arising from an arbitrator's undisclosed, contemporaneous relationship with counsel for one of the parties, does this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) require the petitioner to show that an arbitrator's undisclosed relationship created an "impression of possible bias" or to demonstrate actual bias on the part of the arbitrator?

PARTIES TO THE PROCEEDING

The following are all parties to the proceeding in the court whose judgment is sought to be reviewed:

Petitioner RDC Golf of Florida I, Inc.

Respondent George Apostolicas, individually and derivatively on behalf of Heathrow Golf Company Limited Partnership

Petitioner RDC Golf of Florida I, Inc. is not publicly traded and there is no publicly traded corporation which owns more than 10% of its stock.

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CITATIONS OF REPORTS OF DECISIONS BELOW

The decision of the District Court of Appeal of Florida for the Fifth District is reported at 925 So.2d 1082 (Fla. 5th DCA 2006). The decision of the Florida Supreme Court denying discretionary review and the decision of the Circuit Court for Seminole County, Florida, are unreported.

BASIS FOR JURISDICTION

The judgment sought to be reviewed was issued by the District Court of Appeal of Florida for the Fifth District on March 17, 2006. Rehearing was denied on April 16, 2006. The Supreme Court of Florida denied discretionary review (with the Chief Justice dissenting) by order dated September

21, 2006. Each of these decisions are contained in the Appendix.

Jurisdiction arises in this Court pursuant to 28 U.S.C. § 1257(a) in that Petitioner seeks review by this Court of a decision of the highest Court of a state in which a decision could be had arising from a right or privilege set up or claimed under the statutes of the United States.

STATUTES INVOLVED IN THE CASE

9 U.S.C. § 10(a)(2):

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . .
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

Fla. Stat. Ann. § 682.13(1)(b):

> (1) Upon application of a party, the court shall vacate an award when: . . .
>
> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

STATEMENT OF CASE

RDC Golf of Florida I, Inc. ("RDC") filed this action in Seminole County, Florida Circuit Court (the "Trial Court") seeking to vacate an arbitration award in favor of George P. Apostolicas ("Apostolicas"). RDC sought relief, pursuant to Fla. Stat. Ann. § 682.13(1)(b) as a result of evident partiality by the Chief Arbitrator. The "evident partiality" arose from the Chief Arbitrator's failure to disclose to RDC that, contemporaneously with the underlying arbitration hearing, deliberations and award, he and Apostolicas' attorney were

both actively participating in a 15-year, $3+ million renewal employment contract for the rabbi at their synagogue.

RDC argued that, pursuant to *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) and numerous cases in the U.S. Courts of Appeal and State supreme courts, the undisclosed, concurrent relationship created an impression of possible bias, which constituted "evident partiality" for purposes of vacating the arbitration award. Both the Trial Court and the District Court of Appeal followed a conflicting line of cases in other U.S. Courts of Appeal and other State supreme courts which construe *Commonwealth Coatings* as a plurality rather than a majority opinion and interpret Justice White's concurring opinion as holding that it is necessary to demonstrate actual bias on the part of the arbitrator with an undisclosed relationship. As a result, those courts refused to vacate the arbitration award where there was no demonstration of actual bias on the part of the arbitrator.

A. Heathrow Golf Company Limited Partnership

Appellant Heathrow Golf Company Limited Partnership ("Heathrow") was formed for the purpose of owning and operating the Heathrow Golf and Country Club located in Heathrow, Florida. Heathrow has three Partners. The Ronald A. Schiavone Living Trust ("Schiavone Trust") and Appellee George P. Apostolicas are the two Limited Partners, each holding equal equity interests. Appellant RDC Golf of Florida, I, Inc. ("RDC") is the General Partner of Heathrow.

B. The Arbitration And Chief Arbitrator Grodin's Involvement In The Rubinger Contract

On October 2, 2002, Apostolicas filed a derivative and individual action with the American Arbitration Association ("AAA"), against RDC as General Partner of the Heathrow Partnership. Apostolicas claimed that RDC had mismanaged Heathrow's affairs and violated Heathrow's Limited Part-

nership Agreement in various ways. Apostolicas sought to remove RDC as General Partner and damages. RDC answered and counter-claimed.

The case was assigned to be heard before Arbitrators James Grodin, James Lussier and Joseph Goldstein. The Panelists selected James Grodin as Chairman. In accordance with the AAA Rules, Mr. Grodin made an initial disclosure. On January 31, 2003 Mr. Grodin wrote:

> I have known Mike Levin for over ten years. He and I have been on opposite sides of a case. He has represented religious organizations on whose board I served where I advocated his retention to represent the organization in litigation matters. His family and mine belong to the same Synagogue, and when I was Synagogue president his wife served on the Executive Committee and Board over which I presided. I served as a sole arbitrator on a matter in which Mike Levin represented one of the parties. (30a)

Neither party objected to Mr. Grodin serving as arbitrator after receiving this disclosure. Beginning approximately three months before the arbitration hearing, in February 2004, Apostolicas' counsel, Michael Levin, began representing Rabbi Aaron Rubinger in negotiations to renew an employment contract with Congregation Ohev Shalom. At or about the same time, the President of Ohev Shalom designated Chief Arbitrator Grodin and congregant, Bill Sholk, to represent the Temple in connection with the contract negotiations with Mr. Levin. Despite the pendency of the arbitration and the approaching trial at the time he was appointed to the two member "committee", Chief Arbitrator Grodin disclosed nothing of this matter to Petitioners. However, Mr. Grodin advised Mr. Sholk that he could help with the paperwork, but could not be directly involved in the negotiations because of the pending arbitration involving Mr. Levin.

From February through April 2004, Mr. Sholk and Mr. Levin exchanged proposals for incorporation into the rabbi's

new contract. The Trial Court found that that Mr. Sholk was the negotiator on behalf of the synagogue and that Mr. Grodin provided him legal counsel and prepared all of the drafts of the rabbi's contract.

After Mr. Grodin's return from a three-week cruise in Asia in early April 2004, he began drafting the rabbi's new contract, based upon the term sheets. On April 26, 2004, Grodin forwarded a draft of the proposed contract to Bill Sholk for his review. The draft contract was circulated among the other members of the synagogue's negotiating team. Over the next two days, Mr. Grodin produced three additional drafts of the agreement, incorporating comments from the synagogue's team and suggesting ways to address issues raised by the synagogue team. When the draft contract was ready to send to Mr. Levin, it was emailed to Mr. Sholk on the morning of April 29, who, in turn, forwarded it to Mr. Levin.

Five days after Chief Arbitrator Grodin produced what was by then the fourth draft of the rabbi's contract, and delivered that draft to Mr. Sholk for distribution to Mr. Levin, the RDC/Apostolicas arbitration hearing commenced. At the outset of the hearing, Chief Arbitrator Grodin made the following disclosure on the record:

> As I stated off the record, the arbitrators and the attorneys here know each other. And my guess is that we wouldn't have been picked as arbitrators if the attorneys had not known the arbitrators. So long as the litigants understand that, we have no problem proceeding. (30a-31a)

Mr. Grodin made no mention of the simultaneous and ongoing Rubinger contract negotiation.

The hearings regarding the claims between Apostolicas and RDC then officially began and evidence was presented to the Panel on May 3, 5, 6, 7, 12, 14 and 21. On the final day of

live testimony, Appellant's counsel overheard a portion of a conversation between Chief Arbitrator Grodin and Mr. Levin regarding something about a rabbi's contract and Mr. Levin told Mr. Grodin that he would review it on the plane. The hearing closed on July 7, 2004.

While the hearing was open, and while the award was being deliberated, Chief Arbitrator's Grodin's involvement in the Rubinger transaction became even more extensive. Mr. Levin's initial comments to the draft contract raised substantial issues regarding severance and termination for disability prior to the end of the contract's 15-year term which were not addressed in the draft. Those issues immediately caused friction between Mr. Levin and Mr. Sholk. As the Trial Court found:

> Disability became a contentious issue between Bill Sholk and Michael Levin for two reasons: (1) Bill Sholk thought Michael Levin was trying to change their previous agreement which had already been voted on and approved by the COS and (2) Bill Sholk was irritated by Michael Levin's strident and "obnoxious" e-mails. (42a-43a)

The negotiations between the two sides led to a flurry of emails regarding the issues Mr. Levin had raised. Mr. Grodin was either copied on the emails between Mr. Sholk and Mr. Levin, or Mr. Grodin communicated directly with Mr. Levin. As the Trial Court found,

> The e-mails produced by Jim Grodin reveal that Jim Grodin and Michael Levin were directly and indirectly receiving and sending e-mails regarding the Rabbi's employment contract from June 11th to June 18th and from July 2nd to July 8th. The direct e-mails between Jim Grodin and Michael Levin occurred because Bill Sholk and Michael Levin began "sparking" with each other. (43a)

The Trial Court summarized the emails exchanged as follows:

06/11/04 E-mail from Michael Levin to Bill Sholk, cc: Rabbi, B. Yarmuth, Burt Chasnov, J. Bornstein, Jim Grodin, (I have been immersed in an arbitration immediately followed by a family trip to England . . . Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Burt Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations.)

06/14/04 E-mail from Bill Sholk to Michael Levin (The changes that were made to the disability section . . . They are material to the contract and were agreed upon by both sides. We are now re-negotiating the contract which has been voted on and approved by the executive board and board . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (. . . We are not re-negotiating and simply tying to document the deal made. You are equally wrong about . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (I also would point out that it is not productive to make accusations of "re-negotiating". . . Let's get this put to bed.)

06/14/04 E-mail from Bill Sholk to Burt Chasnov, cc: Jim Grodin, J. Bornstein Subject: another salvo fired from Levin.

06/14/04 E-mail from James Grodin to Michael Levin, Subject: Discretionary Fund (Mike—I have been following the emails. Here is the problem . . . . This is really a bit of a tempest in a teapot . . .)

06/15/04 E-mail from Jim Grodin to Michael Levin (As my kids used to say, my tummy is getting tired.)[1]

06/16/04 E-mail from Michael Levin to Bill Sholk (You are fundamentally wrong . . .)

6/16/04 E-mail from Michael Levin to Bill Sholk (Bill, attached is an e-mail that I received this morning from the Rabbi. He has asked me to share the email with you and your team)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (Call me on my cell. Jim)

6/16/04 E-mail from Michael Levin to Jim Grodin, Subject: Some Synagogue History you need to know (I left a message on your cell. My cell is 321-439-4863. I am meeting Judy for lunch at 1 but otherwise can be reached on the cell all day.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (I'll call when I finish my meeting.)

6/16/04 E-mail from Michael Levin to Bill Sholk, cc: Burt Chasnov, Jim Grodin, J. Bornstein, Rabbi, B. Yarmuth (Hello, all. Following conversations with Jim Grodin and Rabbi Rubinger this afternoon, I am working on a new proposal on the disability issue that I hope to present sometime later this evening. Jim, I will write it so that it can be dropped into the draft contract if acceptable to all.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Bill Sholk cc: Burt Chasnov, J. Bornstein, Rabbi, B. Yarmuth (Thanks Mike)

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[1] Jim Grodin's oldest son (now a doctor) used to say this as a young child when he was frustrated.

6/17/04 E-mail from Michael Levin to Bill Sholk, Jim Grodin, B. Chasnov, J. Bornstein. (Rabbi and I worked late last night on a new proposal on the disability issue. I am waiting for his final comments and hope to get it to you by mid-morning . . .)

6/17/04 E-mail from Michael Levin to Bill Sholk, J. Grodin, B. Chasnov, J. Bomstein, Subject: Attached is a proposed compromise on the disability provision. Please let me know your comments.

06/18/04 E-mail from Michael Levin to Jim Grodin, Bill Sholk. (I was just wondering if there is any response to our proposal on the disability issue . . .)

6/18/04 E-mail from Jim Grodin to Michael Levin (I am out of the loop on the negotiating end. You have to check with Bill.) (43a-45a)

As Mr. Grodin requested in the June 16 email exchange, Mr. Levin and Chief Arbitrator Grodin spoke on the telephone that day. Chief Arbitrator Grodin told Mr. Levin "to 'cut the crap,' come up with a new suggestion and that the contract was going nowhere, that he needed to be positive, and to explain to Michael Levin the history behind the language in an earlier rabbi's contract with COS." (45a-46a) Mr. Levin did exactly as Chief Arbitrator Grodin suggested. Later that afternoon, Mr. Levin sent an email to everyone involved stating: "Following conversations with Jim Grodin and Rabbi Rubinger this afternoon, I am working on a new proposal on the disability issue that I hope to present some time later this evening. Jim, I will write it so that it can be dropped in the draft contract if acceptable to all." (45a). Chief Arbitrator Grodin, continuing to follow the e-mails, responded to Mr. Levin: "thanks Mike". (*Id.*)

The next morning, June 17, 2004, Mr. Levin sent an email to James Grodin and Bill Sholk attaching a modified draft of

the agreement with a proposed compromise on the disability provision. The very next day, the parties to the arbitration submitted their briefs and proposed findings to the arbitration panel. (46a) Mr. Levin sent his final trial brief to Mr. Grodin in the RDC arbitration.

On June 21, Chief Arbitrator Grodin sent an e-mail to Burt Chasnov suggesting a mechanism to bridge the continued gap between the parties on the termination-for-disability provision. That proposal was passed along to attorney Levin and eventually was agreed to and incorporated into the rabbi's agreement on July 8, the day after the record closed for the arbitration hearing.

On August 4, *two days before* the issuance of the arbitration award, Mr. Grodin forwarded the sixth draft of the rabbi's contract to Mr. Sholk. Mr. Grodin produced another draft on August 5 after incorporating changes requested by Burt Chasnov.

The following day, August 6, the Interim Arbitration Award was entered. In summary, the arbitration award found that RDC had mismanaged the golf club and that Heathrow Golf was a "dysfunctional limited partnership". The panel found that it was "not reasonably practicable to carry on the business of Heathrow Golf with RDC as general partner", and, therefore, removed RDC as general partner. The panel denied, however, Apostolicas' claim for damages.

C. RDC Seeks To Overturn The Arbitration Award

Appellants filed a petition to vacate the arbitration award on Monday, August 9. RDC also alleged, upon information and belief, that there was some undisclosed relationship between Chief Arbitrator Grodin and Mr. Levin.[2]

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[2] Over the intervening weekend, Petitioner learned of an ongoing dispute between an Orlando rabbi and his synagogue. Putting together Mr. Grodin's disclosure that he and Mr. Levin attended the same synagogue

The Petition was not served upon Chief Arbitrator Grodin that day. The same day as RDC filed its Petition, Mr. Levin communicated with Mr. Sholk, asking him when Chief Arbitrator Grodin would have the next draft of the rabbi's contract. After further discussion about Burt Chasnov's suggested changes, Mr. Grodin and Mr. Sholk agreed that the contract was complete. RDC's petition was served on the AAA via Federal Express on August 11. That day Mr. Grodin and Mr. Sholk expressed their relief that the contract was done. The final version of the rabbi's contract was signed on September 9.

When the issue of a potential undisclosed relationship between Grodin and Levin was raised by RDC with the AAA, both Mr. Grodin and Mr. Levin repeatedly and vehemently denied having any involvement with each other in the rabbi's contract negotiations. They continued with this position before the Trial Court, even after discovery revealed the extensive contacts between the two of them.

Based on their representations to the AAA of no contact, the AAA reaffirmed Mr. Grodin as chief arbitrator. Nevertheless, on October 11, 2004, Mr. Grodin resigned as arbitrator. On October 25, 2004, the two remaining arbitrators issued a final arbitration award, reaffirming the interim award which all three arbitrators had entered.

On May 4 through 6, 2005, the Trial Court held a hearing with respect to RDC and Heathrow's petition to vacate the arbitration award and Apostolicas' cross-petition to confirm the award. The evidence presented at the hearing was essentially uncontested. RDC argued that the undisclosed relation-

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and the snippet of the conversation between Mr. Grodin and Mr. Levin that Petitioner's counsel overheard on the last day of the arbitration hearing, it appeared to Petitioner that Mr. Grodin and Mr. Levin were on opposite sides of that dispute. As it turned out, the dispute Petitioner learned of involved another synagogue. Petitioner only learned of the contract negotiations between Mr. Grodin and Mr. Levin in discovery.

ship between Mr. Levin and Mr. Grodin created an impression of possible bias and, thus, in accordance with *Commonwealth Coatings*, the undisclosed relationship constituted "evident partiality" for purposes of vacating the arbitration award.

On June 21, 2005, the Trial Court issued the Order confirming the arbitration award and denying RDC and Heathrow's petition to vacate. The Trial Court found that the relationship between Messrs. Grodin and Levin should have been fully disclosed, but there was no evidence that the undisclosed contract negotiations between Mr. Levin and Chief Arbitrator Grodin would tend to bias Mr. Grodin's judgment in favor of Apostolicas or Mr. Levin and, therefore, concluded that there was no evident partiality which would warrant vacating the arbitration award.

In that Order, the Trial Court discussed the standard for vacating an arbitration award as a result of an undisclosed relationship, based upon *Commonwealth Coatings* and its progeny, at length.

> 26. The seminal case in this area is the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), which involved the question of whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration. In *Commonwealth Coatings*, the Supreme Court set aside the arbitration award for evident partiality where the arbitration did not disclose his close financial relations with a contractor that had existed for many years. *Id.* At 148-149. These close business connections were not made known to the losing party to the arbitration until after an award had been entered. Justice Black, writing for a plurality of the Court, stated:
>
> > It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get

> all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. *Id.*

Justice White, in a concurring opinion, stated:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function . . . This . . . means that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial,
>
> * * *
>
> Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award. *Id.* at 150-152.

27. In *Lifecare Intern. Inc.* v. *CD Medical, Inc.*, 68 F.3d 429, 432 (11th Cir. 1995), the Eleventh Circuit stated the test for evident partiality in nondisclosure cases as follows:

> In order to vacate on the ground of evident partiality in a nondisclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a "reasonable impression of partiality." *Middlesex Mut. Ins. Co. v Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982); *Schmitz v. Zilverti*, 20 F.3d 1043, 1048 (9th Cir. 1994). The Court has reasoned that the alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Levine*, 675 F.2d at 1201; *accord, Consol. Coal v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1995); *Health Services Management Corn. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992). Accordingly, the mere appearance of bias or partiality is not enough to set aside an arbitration award. *Consol. Coal*, 48 F.3d at 129; *Health Services Management Corp.*, 975 F.2d at 1264; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984); *see Schmitz*, 20 F.2d at 104647 (rejecting "appearance of bias" standard). (Emphasis added).

28. Most recently in *University Commons-Urbana Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002), the Eleventh Circuit ruled as follows:

> an arbitration award may be vacated due to the evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose information which would lead a reasonable person to believe that a potential conflict exits. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (citing *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) and *Middlesex Mut. Ins. Co, v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982). (35a-38a)

D. RDC Appeals the Trial Court decision

RDC appealed the Trial Court's decision to the District Court of Appeal of Florida for the Fifth District. There, RDC argued that the Trial Court should be reversed because, according to *Commonwealth Coatings*, the appropriate standard for vacating an arbitration award in the event of an undisclosed relationship is "appearance of possible bias", not the actual bias standard applicable to ordinary arbitration cases which the Trial Court applied.

The Fifth District Court of Appeal likewise found that the contemporaneous relationship between Messrs. Grodin and Levin should have been disclosed but, nevertheless affirmed the Trial Court, applying an actual bias standard. The Court of Appeal also discussed, and purported to apply, the standards set forth by *Commonwealth Coatings* and its progeny. Indeed, the Fifth District noted the lower courts differing interpretations of *Commonwealth Coatings*.

> Both Florida and federal law hold that evident partiality is a basis to vacate an arbitration award. § 682.13(1)(b), Fla. Stat. (2004); 9 U.S.C. § 10(a)(2). Because Florida's arbitration statute is modeled after the Federal Arbitration Act, federal decisions are highly persuasive. *See Seretta Constr., Inc. v. Great Am. Ins. Co.*, 869 So.2d 676, 679 (Fla. 5th DCA 2004). However, while decisions of federal courts are persuasive, we are bound only by decisions of the United States Supreme Court. *See Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So.2d 32, 35 (Fla. 2d DCA 2005); *Raymond James Fin. Servs., Inc. v. Saldukas*, 851 So.2d 853, 856 (Fla. 2d DCA 2003).
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> * * *
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> The Federal Arbitration Act likewise authorizes the court to vacate an arbitration award "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). However, "evident par-

> tiality, like obscenity, is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms. No jurist has yet coined an exacting legal standard for 'evident partiality,' although many have tried." *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-MARCUS, 1986 WL 20915, *3-4 (S.D.Fla. Sept.17, 1986) (citations omitted). The definitional difficulties of "evident partiality" notwithstanding, it is settled that the evident partiality inquiry is a case-specific and fact-intensive one. *See Lifecare*, 68 F.3d at 435 (stating that the question of evident partiality is "fact intensive" and "highly dependant on the unique factual settings of each particular case").
>
> The leading United States Supreme Court case concerning claims of arbitral evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). Thus, any inquiry must begin there. (16a-18a)

After quoting extensively from *Commonwealth Coatings*, the Fifth District discussed subsequent interpretations of *Commonwealth Coatings* by the lower courts. (20a-23a) The Fifth District further noted the dispute as to whether Justice Black's opinion was a plurality or majority decision (19a, n. 2), and the "muddled state of the law" created by *Commonwealth Coatings*. (20a, n. 3). The Fifth District concluded that an "appearance of bias" was insufficient to vacate an arbitration award, that it was necessary to demonstrate "a reasonable impression of partiality that was direct, definite, and capable of demonstration".

> Following *Commonwealth Coatings*, the interpretation of what has come to be referred to as the "reasonable impression of partiality" standard has varied somewhat among the different federal courts considering it. The Eleventh Circuit has said that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information that

would lead a reasonable person to believe that a potential conflict exists. *Univ. Commons-Urbana Ltd.*, 304 F.3d at 1339; *Middlesex Mut. Ins. Co.*, 675 F.2d 1197, 1202 (11th Cir.1982). The party challenging the arbitration award must demonstrate that the undisclosed information creates a "reasonable impression of partiality," *Lifecare*, 68 F.3d at 433 (citation omitted), or put another way, "information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). The alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain, and speculative." *Id.; see Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 (11th Cir.1998) (holding that "to vacate an arbitration award for evident partiality, the moving party must present evidence that would support a 'reasonable impression of partiality' on the arbitrator's behalf . . . [t]he assertion of partiality, however, must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative' "). Whether these conditions have been met ordinarily requires a fact-intensive inquiry. *Lifecare*, 68 F.3d at 435. In general, "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Id.* at 433 (citing *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir.1995)). If, however, the moving party can show that an arbitrator failed to disclose a substantial relationship between himself and a party, then the less demanding "appearance of bias" standard applies. *Park v. First Union Brokerage Servs., Inc.*, 926 F.Supp. 1085, 1088 (M.D.Fla.1996) (citing *Commonwealth Coatings*, 393 U.S. at 151-52, 89 S.Ct. 337 (White, J., concurring)).

Other courts have reached similar conclusions, *i.e.*, that the party challenging the arbitration award is required to present admissible, credible evidence that

created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir.2002) ("The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator."); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir.1993) (stating that the alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative); *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir.1991) (a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator"); *Washburn v. McManus*, 895 F.Supp. 392, 398 (D.Conn. 1994) (stating that there must be more than mere appearance of bias to vacate arbitrator's award); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992) (determining that evident partiality within the meaning of subsection (a) of the FAA means more than the mere appearance of bias; to set aside an award for arbitration partiality, the interest or bias must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative); *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493 (Ala. 2003)(holding that under "reasonable impression of partiality standard," party challenging arbitration award was required to present admissible, credible evidence that created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias); *see also Consol. Coal Co.*, 48 F.3d at 129 (determining that to demonstrate evident partiality under the FAA, the party seeking vacation has burden of proving that a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration, and the reasonable person standard requires a showing of more than the

> appearance of bias); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984) (holding that "'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F.Supp. 885, 891 (D.Conn.1991) (stating that the party alleging impropriety "must establish facts that create a reasonable impression of bias or misconduct") (citations omitted).
>
> We conclude that the weight of authority developed after *Commonwealth Coatings* requires a review of the evidence utilizing the "reasonable impression of partiality" standard. As such, we find that the trial court properly weighed RDC's allegations of Grodin's evident partiality by considering whether RDC made a showing through credible evidence, giving rise to a "reasonable impression of partiality" that was "direct, definite, and capable of demonstration," as distinct from a "mere appearance" of bias that was remote, uncertain, and speculative.

(20a-23a) (footnotes omitted)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW HIGHLIGHTS THE LOWER COURTS' CONFLICTING INTERPRETATIONS OF *COMMONWEALTH COATINGS*

The decisions of the courts below bring into stark contrast the two conflicting lines of authority interpreting this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). *Commonwealth Coatings* squarely addressed and decided the issue of the standard to be applied as to whether an arbitrator's undisclosed relationship with a party constitutes "evident partiality" for purposes of vacating an arbitration award. However, two conflicting lines

of authority have developed in the lower courts, both state and Federal, interpreting *Commonwealth Coatings*.

One line of authority reads Justice Black's opinion as a majority opinion and applies a lower "impression of possible bias" standard as enunciated in that opinion. The other line of authority reads Justice Black's opinion as a merely plurality opinion, with Justice White's concurrence setting an undefined, but conflicting, stricter standard. *Morelite Construction Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) ("much of Justice Black's opinion must be read as dicta, and we are left in the dark as to whether an "appearance of bias" will suffice to meet the seemingly more stringent "evident partiality" standard of 9 U.S.C. § 10."). The *Morelite* court found Justice Black and Justice White's opinions to be "irreconcilable" and deemed itself bound only to the extent that Justices Black and White agreed. *Morelite*, 748 F.2d at 83, n. 3. The Second Circuit then went on to formulate its own rule, that the "appearance of bias" standard was too low and proof of actual bias was too high, so that in order to vacate an arbitration award for "evident partiality", "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." 748 F.2d at 83-84. That standard has been applied by most of the courts which read Justice Black's opinion as a plurality, *see* cases cited in note 5 *infra.*, but the more narrow standard is generally interpreted as coming from Justice White's concurrence in *Commonwealth Coatings*.

This case presents the opportunity for the Court to eliminate this split of authority in the lower courts. This is an issue of substantial public importance, particularly in light of the recent rapid increase in the use of alternative dispute resolution. The Court should act to eliminate this conflict, so that arbitrators will know their disclosure obligations, and parties to arbitrations will have a single standard to meet in the event an arbitrator fails to meet their disclosure obliga-

tions, not conflicting standards which will give different results depending upon which state's law applies, or whether an action to vacate an arbitration award is brought in state or federal court.

a) There is a split of authority in the lower courts interpreting *Commonwealth Coatings*

In *Commonwealth Coatings*, one of the arbitrators had failed to disclose he had business dealings with one of the parties to the arbitration. The losing party sought to vacate the adverse arbitration award claiming the undisclosed relationship constituted "evident partiality" which mandated vacating the arbitration award. Even though there was no claim that the arbitrator was anything other than fair and impartial, the arbitration award was vacated because of the arbitrator's failure to disclose the relationship. As Justice Black explained in his opinion:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Commonwealth Coatings, 393 U.S. at 149-50.

Justice White, joined by Justice Marshall, filed a concurring opinion. Justice White began, "While I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks." *Commonwealth Coatings*, 393 U.S. at 150. Justice White continued:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is vol-

untary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party. But if the law requires the disclosure, no such imputation can arise. And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award

Commonwealth Coatings, 393 U.S. at 151-52 (White, J., concurring).

Some lower courts have interpreted Justice Black's opinion as being merely a plurality opinion because they read Justice White's concurring opinion as setting a different standard from Justice Black's. *See Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 499-502 *reh'g en banc granted* 449 F.3d 616 (5th Cir. 2006) (discussing different readings of *Commonwealth Coatings* opinion and holding that evident partiality is demonstrated from the non-disclosure itself, regardless of whether actual bias is established.)

> Although Justice White indicated that he was "glad to join" Justice Black's opinion and that he desired to make "additional remarks," and Justice Black's opinion was designated the "opinion of the court," some lower federal courts have seen a conflict between the two writings. Accordingly, by treating Justice Black's opinion as a plurality opinion, some courts have felt free to reject Justice Black's statement that "evident partiality" is met by an "appearance of bias," and to apply a much narrower standard.

Positive Software, 426 F.3d at 500. As a result, beginning with *Morelite* in 1984, two conflicting lines of authority have developed as to the appropriate standard for vacating an arbitration award based upon undisclosed relationships, with one line of cases applying a narrow demonstrable bias standard and the other line of cases applying a broad appearance of possible bias standard. *See Burlington Northern Railroad v. Tuco, Inc.*, 960 S.W.2d 629, 632-636 (Tex. 1997) (tracing history of case law interpreting *Commonwealth Coatings* and conflicting standards).

Both *Positive Software* and *Tuco* trace the development of the two lines of authority as to the standard to be applied in the event an arbitrator fails to disclose a relationship with one of the parties. In summary, the Fifth, Eighth, Ninth and D.C. Circuits, and Arizona, California, Delaware, Maryland,

Michigan, Minnesota, New Jersey, New York, Texas and Wisconsin[3] follow the broader "impression of possible bias" enunciated by Justice Black in *Commonwealth Coatings*[4], while the Second, Fourth, Sixth, and Seventh Circuits, along with Connecticut, the District of Columbia, Illinois, Louisiana, Mississippi, Missouri, Nebraska, Nevada, and Ohio adopting the more narrow interpretation of Justice White's opinion, imposing the same standard as in ordinary cases, a showing of a "reasonable impression of bias."[5] The Eleventh

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[3] *See Positive Software, id.*; *Olson v. Merryl Lynch, Pierce, Fenner & Smith*, 51 F.3d 157, 159-60 (8th Cir. 1995); *Schmitz v. Ziliveti*, 20 F.3d 1043, 1049 (9th Cir. 1994); *Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C.Cir. 1996); *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 531-32, 937 P.2d 715, 721-22 and n. 7 (1997); *Wheeler v. St. Joseph Hospital*, 63 Cal.App.3d 345, 133 Cal.Rptr. 775, 793 (1976); *Beebe Medical Center, Inc. v. InSight Health Services Corp.*, 751 A.2d 426, 434-35 (Del.Ch. 1999); *Parks v. Sombke*, 127 Md.App. 245, 252-53, 732 A.2d 907, 911 (1999); *Albion Public Schools v. Albion Education Assn.*, 130 Mich.App. 698, 344 N.W.2d 55, 57 (1983); *Safeco Insurance Co. v. Stariha*, 346 N.W.2d 663, 667 (Minn.Ct.App. 1984); *Barcon Associates v. Tri-County Asphalt Corp.* 86 N.J. 179, 430 A.2d 214, 220 (1981); *Kern v. 303 East 57th St. Corp.*, 204 A.D.2d 152, 611 N.Y.S.2d 547, 548-49 (1st Dept. 1994); *Tuco, id.*; *DeBaker v. Shah*, 194 Wis.2d 104, 553 N.W.2d 464, 467-69 (1995).

[4] The Third Circuit would also be considered following the broader rule, since Justice Black relied in part upon *Rogers v. Schering Corp.*, 165 F.Supp. 295, 301 (D.N.J. 1958) *aff'd* 271 F.2d 266 (3d Cir. 1959) *cited with approval by Commonwealth Coatings*, 393 U.S. at 149. ("The failure of the Administrator to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve the controversy—its integrity. In this instance it fails to protect what might be termed "arbitration due process".)

[5] *See Morelite*, 748 F.2d at 84; *Peoples Security Life Ins. Co. v. Monumental Live Insurance Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Apperson v. Fleet Carrier Corp.* 879 F.2d 1334, 1358 (6th Cir. 1989); *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.

Circuit and Florida have conflicting authority, some cases following one rule and some following the other.[6]

b) This case presents an issue of great public importance

The Court should grant the petition for certiorari to resolve this important question of arbitration due process which appeared to have been answered by *Commonwealth Coatings*. Arbitration has exploded in recent years as it has become an increasingly popular method of dispute resolution. Hundreds of thousands of arbitrations are conducted each year. In

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1992); *Local 530, AFSCME, Council 15 v. City of New Haven*, 9 Conn.App. 260, 274, 518 A.2d 941, 949 (1986); *Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334, 340-41 (D.C.App. 2000); *John E. Reid & Associates*, v. *Wicker-Zulawski & Associates*, 255 Ill.App.3d 533, 194 Ill.Dec. 232, 238, 627 N.E.2d 348, 354 (1993); *In re arbitration between U.S. Turnkey Exploration, Inc. and PSI, Inc.*, 577 So.2d 1131, 1135 (La.Ct.App. 1991); *Herrin v. Milton M. Stewart, Inc.*, 558 So.2d 863, 865 (Miss. 1990); *National Ave. Building Co. v. Stewart*, 910 S.W.2d 334, 343 (Mo.Ct.App. 1995); *Dowd v. First Omaha Securities Corp.*, 242 Neb. 347, 357, 495 N.W.2d 36, 42-43 (1993); *Thomas v. City of North Las Vegas*, 127 P.3d 1057, 1069 (Nev. 2006); *Beck Suppliers, Inc. v. Dean Witter Reynolds, Inc.*, 53 Ohio App.3d 98, 558 N.E.2d 1187, 1193 (1988).

[6] *Compare Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998)(arbitration award must be vacated for "evident partiality" when "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.") *with Lifecare International Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (in non-disclosure case, "the mere appearance of bias or partiality is not enough"); 23a (to vacate award in non-disclosure case, petitioner must show a "'reasonable impression of partiality' that was 'direct, definite, and capable of demonstration,' as distinct from a 'mere appearance' of bias that was remote, uncertain, and speculative.") *with Weinger v. State Farm Fire & Casualty Co.*, 620 So.2d 1298, 1299 (Fla. 4th DCA 1993)("an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias. Failure to disclose such an association undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of the award.")

addition, most state arbitration statutes are patterned after the Federal Arbitration Act and state courts use Federal precedent, including those of this Court, in interpreting their own state statutes. Indeed, while the decisions of other Federal courts are simply instructive, the decisions of this Court are binding on the state courts. As a result, this Court's interpretation of the term "evident partiality" in the context of an arbitrator failing to disclose a relationship with a party is particularly important. *Commonwealth Coatings* has been cited by over a thousand published opinions in the lower courts, and it is relied upon by both lines of authority in support of their respective positions resulting in two different standards being applied in non-disclosure cases based upon the same authority. It cannot reasonably be read to support two conflicting standards. The Court should decide which standard is correct.

The conflicting standards create an open invitation to forum shopping, since the standard which will be applied depends upon the court in which an action to vacate or confirm an arbitration award is brought. For example, in the nation's commercial center, New York, which standard is to be applied depends upon whether an aggrieved party seeks relief in Federal or state court, since the Second Circuit follows the narrower "reasonable impression of bias" standard, while New York state courts follow the broader "impression of possible bias" standard.

In addition, many of the cases following the narrower standard agree that the proper standard for disclosure is that an arbitrator should disclose any relationship which might create an impression of possible bias, but will vacate an award only where the non-disclosed relationship creates a reasonable impression of bias. That was the situation in the instant case. The Trial Court found, and the Fifth District agreed, that Mr. Grodin should have disclosed his involvement in the contract negations with Mr. Levin, but would not

vacate the arbitration award because the relationship did not create a reasonable impression of bias. This is contrary to the result in *Commonwealth Coatings*, where the arbitrator's partiality was not questioned, but the arbitration award was nonetheless vacated because he had failed to disclose a relationship which created an appearance of bias.

As the court in *Rogers* noted, disclosure of the arbitrators' relationship with the parties, and giving the parties an opportunity to object to an arbitrator or to continue with the arbitration with knowledge of a potential conflict goes to the heart of "arbitration due process." *Rogers*, 165 F.Supp. at 301. Both Justice Black and Justice White in *Commonwealth Coatings* recognized the importance of an arbitrator's disclosure of potential conflicts to the integrity of the arbitration process.

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Commonwealth Coatings, 393 U.S. at 150.

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties.

Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring).

Even if an arbitrator is not actually biased, his failure to disclose a substantial relationship still deprives a party of a important arbitration due process right, the right of the party to make its own decision regarding the arbitrator's partiality in advance of the arbitration hearing.

> The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Id. The public can have confidence in arbitration only if the process is not only are fair, but also appears to be fair. That confidence is established "by an atmosphere of frankness at the outset", *id.*, but is undermined in cases, such as this one, where the court recognizes that the appearance of fairness requires the disclosure of a substantial relationship between an arbitrator and a party, but leaves the aggrieved party without a remedy if there was no showing that bias infected the arbitration award.

This dual standard discourages, rather than encourages, the openness that both Justices Black and White wrote was necessary for the arbitration process to work properly. In the netherland between relationships which create an "impression of possible bias" and relationships that create a "reasonable impression of bias", a party has a right of disclosure, but no remedy in the event an arbitrator fails to disclose what he should.

An arbitrator has no incentive to disclose anything beyond a clear conflict, since, in the jurisdictions following the narrower standard, a disclosed relationship and an undisclosed relationship will be judged on the same standard, whether the relationship creates an "reasonable impression of bias". Indeed, the arbitrator has an incentive not to disclose a questionable relationship, since if the relationship were

disclosed, he or she would risk an objection from one of the parties and may be forced to withdraw from the arbitration, losing lucrative fees. On the other hand, if the relationship is not disclosed, the arbitrator can participate in the arbitration, and earn his fee. If no one finds out about the relationship, there is no problem, and if someone does find out and seeks to overturn the award, he is in the same position as if the relationship had been disclosed. The award will still be judged by the same standard as if the relationship were disclosed, *i.e.*, whether the relationship created a "reasonable impression of bias".

Clearly, the participants in arbitration, the parties, as well as the arbitrators and the courts called upon to confirm or vacate arbitration awards, should have a uniform standard as to what matters an arbitrator is obligated to disclose, as well as the remedies in the event that an arbitrator fails to fulfill those obligations. This case presents an opportunity to clarify the considerable confusion and conflict in the lower courts which has been created by the differing interpretations of *Commonwealth Coatings*.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant its Petition for Writ of Certiorari in order to resolve the conflict among the Courts of Appeal and the states as to the interpretation of *Commonwealth Coatings.*

Respectfully submitted,

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